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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re KEVIN S., Jr., Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

GINA P. et al.,

Defendants and Appellants.

D049900

(Super. Ct. No. EJ01677D)

APPEAL from a judgment and orders of the Superior Court of San Diego County,  
Gary M. Bubis, Commissioner. Affirmed.

Gina P. and Kevin S., appeal a judgment terminating their parental rights to their  
son, Kevin S., Jr., and orders denying their Welfare and Institutions Code section 388

petitions.<sup>1</sup> They contend the court abused its discretion by denying their petitions without hearings. They also assert the court erred by finding the section 366.26, subdivision (c)(1)(A) exception to adoption did not apply. Gina, joined by Kevin, additionally contends the court denied her due process by preventing her from cross-examining the social worker about her visitation and erred by ruling the doctrine of equitable estoppel did not apply. We affirm the judgment and orders.

### FACTUAL AND PROCEDURAL BACKGROUND

On June 17, 2005, the San Diego County Health and Human Services Agency (the Agency) petitioned on behalf of six-month-old Kevin, Jr., under section 300, subdivision (b), alleging he was at risk because of domestic violence. The social worker reported Gina had a long history of violent relationships and had lost her parental rights to three other children because of domestic violence. At the detention hearing, the court found Kevin was the presumed father and issued a pick up and detain order for Kevin, Jr. He was found with Gina in Michigan, returned to California and placed with his maternal aunt and uncle.

The social worker recommended reunification services for Kevin, but not for Gina because she had not taken advantage of services in the past. On August 26, 2005, the court sustained the petition, continued Kevin, Jr., in relative care, ordered Gina not be provided services, and ordered Kevin to comply with his services plan, which included a

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

52-week domestic violence program, therapy, parenting education and the Substance Abuse Recovery Management System Program (SARMS).

In January 2006, the social worker reported Gina was employed and having visits with Kevin, Jr. She said she wanted to participate in services on her own and in September 2005 reported she had had a psychological evaluation and was having therapy and attending parenting classes. Kevin did not keep therapy appointments. He moved away for a short time and then returned to San Diego, where he reenrolled in therapy and domestic violence treatment, but not in parenting classes or SARMS. Both parents were having appropriate visits with Kevin, Jr.

At the six-month review hearing on March 24, 2006, the court found Kevin had not made substantive progress in services and there was no substantial probability Kevin, Jr., could return to parental custody within the next six months. The court terminated Kevin's services, continued the relative placement and set a section 366.26 hearing.

The social worker recommended Kevin, Jr. be adopted. She reported he was happy and well adjusted living with his aunt and uncle, who had adopted his half-sister and wanted to adopt him as well. In addition, 45 other approved adoptive families were interested in adopting a child like him. Gina had problems attending visits and the visitation facility closed her case. Kevin had problems with visits also. Staff at the facility reported he displayed poor behavior in front of Kevin, Jr.

The social worker reported in July 2006 Kevin was arrested for violating a restraining order that required him to stay away from Gina. In August 2006, Gina

resumed visiting Kevin, Jr., after not visiting for six months. The supervisor reported she was passive and had difficulty engaging Kevin, Jr.'s interest. Kevin started visiting again after a short hiatus. Kevin, Jr., appeared happy to see him and they laughed and played together. The social worker said Kevin, Jr., separated easily from each parent at the end of visits. She said Gina appeared not to be able to parent Kevin, Jr., and they did not have a bond. She opined although Kevin showed he had more of a relationship with Kevin, Jr., he had not shown he could meet Kevin, Jr.'s, needs for longer than a two-hour visit, and Kevin, Jr., would not be harmed by termination of Gina's and Kevin's parental rights.

In October 2006, Gina and Kevin filed section 388 petitions in which they sought modification of the court's order setting a section 366.26 hearing. Gina requested a finding Kevin, Jr., was likely to be returned to her custody in six months. She argued she had been attending therapy and domestic violence, anger management and parenting classes, and had cared for Kevin, Jr., for the first months of his life, and he would suffer if their significant bond were severed. She provided documentation showing she had had a psychiatric evaluation and eight anger management sessions, 30 group therapy sessions and 13 individual sessions. Kevin sought Kevin, Jr.'s, placement or vacation of the section 366.26 hearing and a finding Kevin, Jr., would be returned to his custody within six months. He argued he had completed more than half of a domestic violence program, was employed, had a home for Kevin, Jr., and his proposal was in Kevin, Jr.'s, best interests.

The court summarily denied the parents' petitions, finding they had not made prima facie showings of changed circumstances or that granting relief was in Kevin, Jr.'s, best interests.

For the section 366.26 hearing, the social worker testified Kevin and Kevin, Jr., had positive visits together. Kevin, Jr., was happy to see Kevin, but when visits ended, he returned easily to the foster parent, except on one occasion when he appeared sad when a visit with Kevin ended. The social worker opined Kevin, Jr., had no bond with Gina and said he clung to the foster mother when they entered the visitation room for visits with her. She opined the parents had not assumed parental roles or shown they could meet Kevin, Jr.'s, needs.

Kevin testified Kevin, Jr., showed him great affection during visits and sometimes said, "no, no, don't go," when visits ended.

Gina testified she visited Kevin, Jr., weekly from July 2005 until January 2006. She said she brought food, they played and Kevin Jr. seemed sad when she left. She testified she had no visits for a long time because she was trying to reach the social worker whose name she had been given, but that social worker had retired. She said she attempted to contact the Agency several times to restore visitation, and once it resumed, visits went well.

The court found Kevin Jr. was adoptable and none of the exceptions of section 366.26 applied. It terminated parental rights and found adoption was the appropriate permanent plan.

## DISCUSSION

### *I. Section 388 Petitions*

Kevin and Gina contend the court erred in denying their section 388 petitions without holding hearings.

Section 388 provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstances or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of the court previously made or to terminate the jurisdiction of the court . . . .[¶] . . . [¶]

"(c) If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held . . . ."

In order to gain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570(a)(7); *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) "It is not enough for the parent to show *just* a genuine change of circumstances under the statute[, t]he parent must [also] show that the undoing of the prior order would be in the best interests of the child." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

"[I]f the petition presents *any* evidence that a hearing would promote the best interests of the child, the court must order the hearing." (*In re Angel B, supra*, 97

Cal.App.4th at p. 461.) ""The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." [Citations.] (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) However, a reviewing court will not disturb a court's ruling in a dependency proceeding "" . . . unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."" (*In re Stephanie M., supra*, 7 Cal.4th at p. 318, quoting *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421.)

"A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Gina did not show the court abused its discretion by summarily denying her petition. She told the social worker she wanted to start services on her own, and the social worker provided referrals. But, the documentation she provided indicated she did not enroll in domestic violence classes until July 2006, only three months before she filed her petition. The progress report she submitted, dated August 10, 2006, said she had completed eight weeks of a domestic violence program. When considering Gina's petition on October 19, the court stated:

"I have a lady who has been involved with huge mental health issues, with multiple domestic violence relationships. . . . She has completed some kind of domestic violence program. It is not a standard 52-week program. [¶] . . . [¶] The court is aware that there are 12 week programs, but hardly with someone who has been

struggling with domestic violence since 1999, has lost three children to adoption, a 12-week program does not in any way show a changed circumstance that the domestic violence is not an issue."

The court did not err in finding that Gina's claim she completed a 12-week domestic violence program and had been attending anger management and parenting classes and therapy was not sufficient for a prima facie showing of changed circumstances warranting a hearing on the petition and that she made no showing that granting the petition would be of benefit to Kevin, Jr.

The court also did not err by summarily denying Kevin's section 388 petition. Kevin alleged he continued to attend domestic violence classes, was employed and had a home for Kevin, Jr. Kevin, however, began a domestic violence program in June 2005 and by the time of the hearing 15 months later had completed only 28 sessions. The evaluations indicated he was still in the process of making progress in this important area. Also, he missed numerous therapy sessions, was in poor compliance with SARMS requirements, and had not yet had a psychological evaluation or completed parenting education. The court stated:

"The father shows a changing circumstance at best. He has had four failures to complete his D.V. program. The type of domestic violence in this case is not some type of simple domestic violence, and routinely it would require a 52-week domestic violence program. He has not completed that domestic violence program. [¶] . . . [¶] Considering the nature of the anger issues, also, therapy was requested, and there is no indication that he's actively engaged in therapy."



The court did not err in finding Kevin had not made a prima facie showing that his circumstances had changed or that Kevin, Jr.'s, best interests would be served by granting the petition.

*II. The Beneficial Relationship Exception to Adoption of Section 366.26, Subdivision (c)(1)(A)*

Gina and Kevin contend the court erred by not applying the exception to adoption of section 366.26, subdivision (c)(1)(A). Kevin argues he showed he occupied a parental role in Kevin, Jr.'s, life, they had a significant, positive emotional attachment and the severance of their relationship would cause Kevin, Jr., great harm. Gina asserts she visited to the extent she was provided visitation, and the social worker's opinion she and Kevin, Jr., did not have a close relationship should be disregarded because the social worker lacked personal knowledge of their relationship.

Under section 366.26, subdivision (c)(1), if the court finds by clear and convincing evidence that a child is adoptable, it will terminate parental rights unless it finds termination would be detrimental because of one of six exceptions listed in section 366.26, subdivision (c)(1). Adoption is the permanent plan favored by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If a child is found to be adoptable it becomes the parents' burden to show termination of parental rights would be detrimental because one of the specified exceptions of section 366.26, subdivision (c)(1) exists. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 574.) Under the exception in section 366.26, subdivision (c)(1)(A), the parent must show termination would be detrimental in that "[t]he parents have maintained regular visitation and contact with the child and the

child would benefit from continuing the relationship." In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, the court noted "[c]ourts have required more than just 'frequent and loving contact' to establish the requisite benefit for [the exception of section 366.26, subdivision (c)(1)(A)]."

"The [section 366.26, subdivision (c)(1)(A)] exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between the parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.) In reviewing whether sufficient evidence supports the trial court's finding the appellate court reviews the evidence in the light most favorable to the court's order, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. (*Id.* at p. 576.)

In *In re Autumn H.*, *supra*, 27 Cal.App.4th, at pages 575 through 577, this court found substantial evidence to support an order terminating parental rights. This court stated:

"In the context of the dependency scheme prescribed by the Legislature, we interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Id.* at p. 575.)

Substantial evidence supports the court's finding the beneficial relationship exception did not apply. Kevin was generally consistent in visiting. By all reports

Kevin, Jr., enjoyed their visits and he and Kevin had a loving relationship. However, the visits never progressed beyond weekly, supervised visits, and Kevin, Jr., did not appear to be upset when Kevin stopped visiting. The social worker had observed seven visits between Kevin and Kevin, Jr., reviewed records of previous visits and discussed the history of visitation with the previous social worker. She determined there was no parent-child relationship, and Kevin, Jr., would not be significantly harmed by termination of parental rights. The court was entitled to rely on the social worker's testimony and opinion. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420-1421.)

Substantial evidence supports the finding the beneficial relationship exception did not apply to Gina as well. Her visitation was irregular. Visits were arranged beginning in November 2005, but the visitation facility closed her case in February 2006 when she began missing visits, and she did not visit again until June 2006. When she contacted the social worker and a visit was arranged, she did not appear for the visit even though the visitation center left several messages for her. Also, Gina did not show she had a parent-child relationship with Kevin, Jr. Her visits always remained supervised. The social worker reported that when Gina began visiting again after the six-month hiatus, she was passive with Kevin and not able to engage his interest. He cried when the foster mother left and Gina could not console him, and he was happy when the foster mother returned. Gina made no showing that any benefit to Kevin, Jr., from continuing their relationship would be more beneficial than the stability he would gain from an adoptive home.

### *III. Cross Examination on the Issue of Visitation*

Gina contends the juvenile court violated her right to due process by denying her the opportunity to cross-examine the social worker on the issue of visitation. She argues she was prevented from visiting regularly by the Agency changing her social worker and then providing her with the name of a social worker who had retired. She complains she was not allowed to cross-examine the social worker about the visitation issue and argues the juvenile court should have applied the doctrine of equitable estoppel against the Agency because it impeded her ability to have regular visits.

Gina did not raise the issue of visitation in the juvenile court during the time she was having problems with visitation. If she had done so, measures could have been taken to remedy the problem. She was present at the January 3 and February 2, 2006 hearings, but she did not complain then or during other hearings of problems with visitation. Because she did not raise the issue until the section 366.26 hearing, the court reasonably considered her argument a belated attack on the quality of services. This argument was not a proper issue at the section 366.26 hearing. (See *In re Marilyn H.* (1993) 5 Cal.4th 295, 304-309.) Moreover, Gina was able to bring the issue to the court's attention through her testimony at the hearing about the quality of her visitation, including her attempts to contact the Agency so that she could resume visitation. Gina has not shown error. The doctrine of equitable estoppel does not apply.

DISPOSITION

The judgment and orders are affirmed.

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HUFFMAN, Acting P. J.

I CONCUR:

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O'ROURKE, J.

I CONCUR IN THE RESULT:

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McDONALD, J.